Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1536

KABUA KABUA, et al., *Petitioners*

vs.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

KABUA KABUA, et al., *Petitioners*

vs.

UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on December 15, 1976.

CITATION TO OPINION BELOW

The opinion of the United States Court of Claims dated December 15, 1976, appears as Appendix A, *infra*, and is reported at 546 F.2d 381 (Ct.Cl. 1976).

JURISDICTION

The judgment of the United States Court of Claims was entered on December 15, 1976. A timely Motion for Rehearing en banc was denied on February 4, 1977. The order of the United States Court of Claims deny-

ing this motion appears as Appendix B, *infra*, and is unreported. This Court has jurisdiction pursuant to 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

In Micronesia, where the United States acts through the Trust Territory Government as trustee for the benefit of the Micronesian people under a Trusteeship Agreement with the United Nations which expressly requires the United States to "protect the inhabitants against the loss of their lands", and specific land is determined by the Trust Territory Government to be privately owned,

1. May the United States acting through the Trust Territory Government convey use and occupancy of that land to itself acting through the Department of the Navy prior to the determination that the land is private and then claim that the statute of limitations bars suit for compensation in the Court of Claims more than six years after the date of the conveyance?

2. As the United States through the Trust Territory Government negotiates with the private owners over the amount of compensation they should receive, must the owners assume that the United States intended at the outset to breach any obligation it may have to pay compensation under the Trusteeship Agreement so that the statute of limitations immediately began to run or may they assume that the United States intends to discharge such obligation until it takes some act in repudiation of that obligation?

3. If the conduct of the parties gives rise to a contract implied in fact to conduct negotiations and to pay compensation, can the starting date for the statute

of limitations be set at a point in that conduct which precedes fulfillment by the private owners of their duty under the contract to negotiate or does the statute begin to run after they have fulfilled their duty and reciprocal performance is due from the United States?

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The constitutional provision involved is the Fifth Amendment, which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The treaty involved is the Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665 set forth in Appendix C, *infra*.

The statutes involved are:

1. The statute of limitations for the Court of Claims, 28 U.S.C. § 2501, which provides:

> "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

2. The Enabling Act, providing for the continuance of civil government in the Trust Territory, 48 U.S.C. § 1681, which states:

> "(a) Until Congress shall further provide for the government of the Trust Territory of the Pacific Islands, all executive, legislative, and judicial authority necessary for the civil administration of the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such a manner and through such agency or agencies as the President of the United States may direct or authorize.
>
> (b) The head of any department, corporation, or other agency of the executive branch of the Government may, upon the request of the Secretary of the Interior, extend to the Trust Territory of the Pacific Islands, with or without reimbursement, scientific, technical, and other assistance under any program administered by such agency, or extend to the Trust Territory any Federal program administered by such agency, if the assistance or program will promote the welfare of the Trust Territory, notwithstanding any provision of law under which the Trust Territory may otherwise be ineligible for the assistance or program: *Provided*, That the Secretary of the Interior shall not request assistance pursuant to this subsection that involves, in the aggregate, an estimated nonreimbursable cost in any one fiscal year in excess of $150,000: *Provided further*, That the cost of any program extended to the Trust Territory under this subsection shall be reimbursable out of appropriations authorized and made for the government of the Trust Territory pursuant to section 2 of this Act, as amended. The provisions of this subsection shall not apply to financial assistance under a grant-in-aid program."

3. Trust Territory Code section 11101, which provides:

> "Only citizens of the Trust Territory or corporations wholly owned by citizens of the Trust Territory may hold title to land in the Trust Territory; PROVIDED, that nothing herein shall be construed to divest or impair the right, title, or interest of noncitizens or their heirs or devisees, in lands in the Trust Territory held by such persons prior to December 8, 1941, and which have not been vested in the Alien Property Custodian by Vesting Order dated September 27, 1951, or, if vested, are released from the terms of said order by direction of the High Commissioner; PROVIDED FURTHER, that nothing herein shall be construed to prevent the Government of the Trust Territory from holding title to lands in the Trust Territory; AND FURTHER PROVIDED, that this Section shall not apply to cooperative associations and credit unions duly organized and incorporated pursuant to the laws of the Trust Territory."

STATEMENT OF THE CASE

Micronesia, the Trust Territory of the Pacific Islands, consists of the Mariana, the Marshall and the Caroline Islands. The United States administers Micronesia under the Trusteeship Agreement for the Former Japanese Mandated Islands with the United Nations. 61 Stat. 3301. This administration is conducted through the Trust Territory Government, whose executive branch is headed by a High Commissioner appointed by the President of the United States and confirmed by the Senate. The High Commissioner is an agent both of the President of the United States and of the Department of Interior, which has exercised the administrative responsibility of the United

States over Micronesia since 1951. Exec. Order No. 10265, 16 F.R. 6419, 3 C.F.R. 766 (1949-1953 Comp.). This responsibility was confirmed in 1962, Exec. Order No. 11021, 27 F.R. 4409, 3 C.F.R. 600 (1959-1963 Comp.), following the passage of an Enabling Act, 48 U.S.C. §§ 1681 *et seq.* in 1954. The Enabling Act provides:

> "Until Congress shall further provide for the government of the Trust Territory of the Pacific Islands, all executive, legislative, and judicial authority necessary for the civil administration for the Trust Territory shall continue to be vested in such person or persons and shall be exercised in such manner and through such agency or agencies as the President of the United States may direct or authorize."

This case involves a small island named Roi-Namur in Kwajalein Atoll in the Marshall Islands. The petitioners are the hereditary leaders of the people of Roi-Namur and the possessors of Iroij (head chief or king) rights to the island.

Petitioners brought this action in the Court of Claims to recover for themselves, and for the lesser chiefs and people of Roi-Namur whose interests petitioners represent by reason of their hierarchical status, compensation for the use and occupancy of Roi-Namur by the United States Navy. Jurisdiction was premised on 28 U.S.C. § 1491. The Constitution of the United States, the Enabling Act implementing a treatty of the United States, and the federal law of implied contract were all presented.

Although the Navy is currently in possession of Roi-Namur, and the United States through the Trust Territory Government had been negotiating with petitioners over the amount of compensation from 1969 to 1974, the Court of Claims denied any recovery on the ground that the six-year statute of limitations had run. It started the chronology, and the running of the statute of limitations, in 1960:

> "We pass over any happening before 1960, but since that date the United States has been in open and notorious possession under claim of right, and has made large improvements, under an agreement with the Trust Territory which purported to act as the owner." 546 F.2d at 383.

In February 1960, the following cables were exchanged between the High Commissioner and the District Administrator for the Marshall Islands, with copies to the Navy:

> "MESSAGE INQUIRY INDICATES NAVY DESIRES LICENSE ARMY ENGINEERS TO USE INDEFINITELY ALL OF ROI-NAMUR X REQUIRE CONFIRM THAT ROI-NAMUR NOW TRUST TERRITORY GOVERNMENT OWNED AND NOT SUBJECT TO PRIVATE CLAIM X IF CONFIRM COMMA PROPOSE ISSUE USE AND OCCUPANCY AGREEMENT TO U S GOVT PER NAVY DASH TRUST TERRITORY AGREEMENT DATE 6 JULY 1956."
>
> "YOUR 042322Z RE ROI NAMUR X ROI NAMUR OWNED BY TT GOVT BUT PUBLIC HEARINGS HAVE NOT BEEN HELD TO DETERMINE WHETHER ANY CLAIMS WILL BE FILED TO CONTEST TT OWNERSHIP X ROI NAMUR IN STATUS SIMILAR WOTJE ISLAND AND OTHER MARSHALLESE LANDS TAKEN BY JAPANESE DURING OR IMMEDIATELY BEFORE WORLD WAR TWO." *Defendant's Exhibit No. 14.*

Despite this advice that the title of the Trust Territory Government was in doubt, the Trust Territory

Government and the Navy proceeded to execute the Use and Occupancy Agreement. As explained in a 1967 letter from the High Commissioner to the Commander, Pacific Division, Naval Facilities Engineering Command:

> "The following [above] two messages (quoted for your ready reference) brought this matter to the attention of all concerned, but military necessity to commence construction on the islands required that execution of the agreement proceed. . . ." *Id.*

In November, 1962 and March, 1964, the Trust Territory Government published notice that Roi-Namur was considered to be public land, but invited the submission of any private claims. 546 F.2d at 383. The petitioners filed their claims in 1963 and 1964. *Id.*

In April, 1965, the Land Management Administrator rendered the determination in petitioners' favor, confirming their Iroij rights and establishing that Roi-Namur was privately owned. *Id.*

In December, 1965, petitioners advised the High Commissioner by letter that "they agreed to allow the United States to retain undisturbed possession of the land, pending negotiations toward compensation." *Id.*

Negotiations with petitioners were conducted by the Trust Territory Government. They began in March, 1969, when the Attorney General of the Trust Territory presented petitioners with a proposed agreement calling for $1,000 per acre for a period of 99 years, or a total of $400,000. In April, 1969, that proposal was rejected, and a new one was made. It called for $100,000 for the previous 25 years and "$400,000 for the use of the land for 25 years beginning in 1969." *Appendix I to Petition, Tab 11,* p. 4. That offer was also rejected.

On October 22, 1970, the High Commissioner wrote a letter informing petitioners that an appraiser, Ray Hambleton, had been retained and that negotiations would be resumed after his report was received. "After the report is received, the Trust Territory Government will resume negotiations in an effort to reach a prompt and fair settlement." *Appendix I to Petition, Tab 10.* The Hambleton appraisal was completed in April, 1972 and proposed a rental value of $7,666.67 per acre for a 50 year period ending February 6, 1994, or a total of $2,668,000. 546 F.2d at 383. The Navy rejected the Hambleton appraisal as a basis of compensation in September, 1972.

On February 14, 1974, the Office of Management and Budget transferred responsibility for the conduct of settlement negotiations with petitioners from the Department of Interior to the Department of Defense. *Id.* at 384-85.

On July 14, 1975, the Department of Justice, in paragraph 4 of the Ninth Defense in its Answer, asserted:

> "If the actions of the United States complained of in this case constituted a taking of plaintiffs' property, those actions constitute a taking of the full complete ownership amounting to the acquisition by the United States of the fee simple title to the lands."

REASONS WHY THE WRIT SHOULD BE GRANTED

The United States is currently negotiating with representatives of Micronesia over the future political status of Micronesia. While those negotiations origin-

ally envisioned a unified result for all of Micronesia—at least from the vantage point of the United States—the United States has agreed to, and has entered, a separate resolution with the Marianas.

Representatives of the Marshalls, where Roi-Namur is located, have indicated to the United States their desire to engage in separate negotiations as well. That issue is pending.

Whether the United States negotiates with the Marshalls as a separate entity or as part of Micronesia without the Marianas, a key issue in those negotiations will be land. In the words of the Trust Territory Government:

> "Land in Micronesia is a very scarce commodity and commands a place in the people's lives far beyond the feeling of Americans whose laws consider land as something which can be assigned a monetary value. Land in Micronesia is still equated with people." U.S. Department of State, Pub. No. 8520, 23rd Annual Report, Trust Territory of the Pacific Islands 60 (1971), quoted in Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 18 N.Y.L.F. 139, 156 (1972).

With respect to the Marshalls alone,

> "The Marshallese system of land tenure provides for all eventualities and takes care of the needs of all of the members of the Marshallese society. It is, in effect, its social security. Under normal conditions no one need go hungry for lack of land from which to draw food. There are no poor houses or old people's homes in the Marshall Islands. The system provides for all members of the Marshallese society, each of whom is born into land rights." J. Tobin, "Land Tenure in the Marshall Islands" in *Land Tenure Patterns in the Trust Territory of the Pacific Islands*, Vol. I, p. 2. (J. deYoung, ed. 1958).

Not only is land thus of paramount importance to the Marshallese and other Micronesian people, but the United States is also most interested in land in the Marshalls. It has an enormous investment in, and commitment to, the Kwajalein Missile Range. Positions announced by the United States with respect to its intentions at Kwajalein will necessarily be viewed by the Marshallese in light of their experience with Roi-Namur, part of the same atoll.

The total posture of the United States as a negotiator will be judged on the Micronesian side in light of the past performance of the United States on such matters of paramount importance. The presentations or protestations that may be delivered to the United Nations, where the Marshallese have already appeared before the Security Council, will be a reflection of that judgment.

The importance of the decision of the Court of Claims thus assumes international dimensions. Unreviewed, the decision of the Court of Claims will define the image of the United States in fields far beyond the traditional range of that court's competence.

I. The Duties and Obligations of the United States Under the Trusteeship Agreement, and Specifically the Capacity of the United States to Invoke the Statute of Limitations Against Its Beneficiaries, Raise Important Questions of Law Which Should Be but Have Not Been Settled by This Court.

Two Courts of Appeals have considered the Trusteeship Agreement, but this Court has not.

In *People of Saipan* v. *United States Department of Interior,* 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975), the Court of Appeals for the Ninth Circuit read the Trusteeship Agreement to "create for the islanders substantive rights that are judicially enforceable" and cited to *Diggs* v. *Shultz,* 470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973) as support for the proposition that "the islanders here can enforce their treaty rights, if need be in a federal court." *People of Saipan, supra* at 96.

In *Mister Ralpho* v. *Bell,* —— F.2d ——, Slip Op. 75-2088 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia Circuit held that "the actions of the United States in the Trust Territories [are] constrained by due process." Slip Op. at 20. The court observed, "Of course, the United States does not hold the Trust Territory in fee simple, as it were, but rather as a trustee. . . ." *Id.* at 19.

The Court of Claims decision is the other word of the federal judiciary on the subject. It is the only word on the specific impact of the Trusteeship Agreement upon United States use of private land. It allows the United States to create a claim of right for itself against the beneficiaries of its trust by the simple expedient of conveying use and occupancy from one of its instrumentalities to another. It then elevates this claim of right into effective ownership for itself, denying the beneficiaries a remedy on the basis of a statute of limitations while recognizing that they have a "moral" entitlement.

The performance of the United States as a trustee should surely meet a higher standard. Only this Court can establish that standard. This is an optimal time

when the Marshallese, the rest of the peoples of Micronesia, and the United Nations will be so carefully watching. It is particularly appropriate because the decision of the Court of Claims is in conflict with the law of the Trust Territory and with an applicable decision of this Court.

A. The Decision of the Court of Claims is in Conflict With the Law of the Trust Territory

As noted, the effect of the Court of Claims decision is to treat the United States as having ownership of Roi-Namur. Yet § 11101 of the Trust Territory Code specifically provides to the contrary:

> "Only citizens of the Trust Territory or corporations wholly owned by citizens of the Trust Territory may hold title to land in the Trust Territory; Provided, that nothing . . . herein shall be construed to prevent the government of the Trust Territory from holding title to lands in the Trust Territory. . . ."

Not only does the Court of Claims decision fly in the face of this express provision of the Code, but it is inconsistent with the position taken by the Executive Branch of the Trust Territory. The Trust Territory Government recognizes petitioners as the owners of Roi-Namur and has expressly done so well within the six-year statute of limitations. As stated by the High Commissioner in his October, 1970 letter:

> "Since 1965, when the islands of Roi, Endrikrik and Namur were determined to be private land, this Government had been continuously working with agencies of the Department of Defense, the Interior Department in Washington, D.C. and with the property owners to obtain a settlement

satisfactory to all concerned. That is still our goal." *Appendix I to Petition, Tab 10.*

B. The Decision of the Court of Claims is in Conflict with the Applicable Decision of This Court

If the possession of the United States is viewed as a taking, the decision of the Court of Claims is inconsistent with a leading decision of this Court.

This Court has ruled that a taking occurs when "a final account may be struck." *United States* v. *Dickinson,* 331 U.S. 745, 749 (1947). In 1974, the Court of Claims followed this ruling in a case arising in the Trust Territory:

> "When in 1968 the owners of Marpi region lands were permitted to return to their property, it was finally possible to compute the extent and duration of the taking. It was then that a final account could be stated. Under the rule set out by the Supreme Court in *Dickinson,* plaintiff was not obligated to bring multiple piecemeal suits to compensate him for the loss of occupancy prior to 1968. He could wait until the property was returned to him by defendant in 1968 before he brought suit in this court." *Castro* v. *United States,* 500 F.2d 436, 442 (Ct.Cl. 1974).

This time, the court classed *Castro* as involving a "temporary taking for varying and different temporary reasons," to be contrasted with this case, "a use commenced in 1960 and never subsequently varied, with long retention obviously visualized in view of the large construction of facilities." 546 F.2d at 384.

But the plain fact is that the extent of the use could not be known in 1960, or in 1965 when petitioners' title

was determined, or, indeed, even prior to the decision by the Court of Claims. The stated use has varied from a 99 year lease offered in March of 1969, through 25 years from 1969 offered in April of 1969, through a 50 year term ending February 6, 1994, proposed by the Hambleton appraisal in 1972, to a fee simple asserted in the Answer in 1975, to the sort of ownership contemplated by the decision of the Court of Claims.

Moreover, the United States may have been in possession as a user since 1960, but it did not begin possession as a taker prior to filing its Answer in the Court of Claims. To this day, the United States recognizes the title of the Trust Territory Government as it relies on the Use and Occupancy Agreement. The title of the petitioners was not asserted until the first claim in 1963 nor established as a matter of law until 1965. As soon as their title was established, petitioners consented to possession of the United States; and the United States did not act adversely to that title—nor did any other party—until the filing of the Answer in 1975.

II. In Allowing the United States as Trustee to Invoke the Statute of Limitations Without First Repudiating the Trust, the Decision of the Court of Claims Has So Far Departed From the Accepted Course As to Call for an Exercise of This Court's Supervision.

The United States has not repudiated the Trusteeship Agreement in general. The ongoing negotiations over the future political status of Micronesia prove as much.

The United States did not set up a repudiation specifically as to petitioners until the filing of its Answer in the Court of Claims. Indeed, the Court of

Claims generalized on this subject that "plaintiffs are often astounded to encounter objections to the very existence of their claims, that were not heard of or not urged in the prior negotiations." 546 F.2d at 385.

The earliest intimation that petitioners could possibly have had that the United States might repudiate its trust was in 1974, when the Office of Management and Budget transferred responsibility for negotiations with petitioners from the Department of Interior to the Department of Defense. Arguably, this transfer away from the Department with administrative responsibility over the Trust Territory Government to the Department with administrative responsibility over the Navy indicated that the United States was abandoning the owner and lining up with the user of Roi-Namur. Conceivably, this move was foreshadowed by the rejection of the Hambleton appraisal by the Navy in 1972. That was all well within six years of 1975, when suit was brought.

As stated in *Manchester Band of Pomo Indians* v. *United States*, 363 F.Supp. 1238, 1249 (N.D. Cal. 1973) (emphasis added):

> "[W]here, as here, there is a fiduciary relationship between the parties, the *universal rule* is that 'a statute of limitation does not begin to run where there is a fiduciary relationship between the parties until the relationship is repudiated.' Kasey v. Molybdenum Corporation of America, 336 F.2d 560, 569 (9 Cir. 1964). See generally 31 Cal.Jur.2d, Limitation of Actions, §§ 22, 23, 138-141. See also Oldland v. Gray, 179 F.2d 408, 415-416 (10 Cir. 1950), cert. denied, 339 U.S. 948, 70 S.Ct. 803, 94 L.Ed. 1362; Sadler v. Sadler, 73 F.Supp. 583, 586 (D.Nev. 1947), 167 F.2d 1 (9 Cir. 1948); Stoll v. Selander, 81 Cal.App.2d 286, 183 P.2d 935, 939 (1947); ("the statute of limitations never runs in favor of a trustee as against a beneficiary while the latter is in possession of the property") Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557, 563 (1947). Accord: United States v. Taylor, 104 U.S. 216, 221-222, 26 L.Ed. 721 (1881). Thus, the statute does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship terminated."

This rule has been used to facilitate recovery by the United States, *United States* v. *Rose*, 346 F.2d 985 (3d Cir. 1965), *cert. denied*, 382 U.S. 979 (1966) and has been recognized in the Courts of Appeals as recently as 1975, *Connell* v. *United States Steel Corporation*, 516 F.2d 401 (5th Cir. 1975).

The departure of the Court of Claims from this established law, to the devastation of the beneficiaries of the United States as trustee, is so great that the exercise of this Court's supervision is warranted.

III. In According a Starting Point to the Statute of Limitations That Preceded Petitioners' Fulfillment of Their Own Performance, the Court of Claims So Far Departed From the Usual Course As to Call for the Exercise of This Court's Supervision.

The Court of Claims decision on this score is somewhat mystifying.

The contract implied in fact was to negotiate and to pay compensation in return for continued occupancy. Negotiation is a two-way street. It cannot be done by one side alone. As recently as October 22, 1970, petitioners were advised by the High Commis-

sioner, the chief executive of the Trust Territory Government with which they were negotiating, that

> "the services of Mr. Ray Hambleton, a professional land appraiser from Honolulu, were obtained by the Government to prepare an evaluation report of the fair value of Roi-Namur. We anticipate receiving his final report about the end of November of this year. After the report is received, the Trust Territory Government will resume negotiations in an effort to reach a prompt and fair settlement." *Appendix I to Petition, Tab 10.*

If petitioners had brought suit at that point, they would not have fulfilled their own duty to negotiate. They would not have met the standard the Court of Claims purported to apply, "when all that is required of him by the terms of the contract has been fulfilled by the contractor." *Steel Improvement & Forge Co. v. United States*, 355 F.2d 627, 630 (Ct.Cl. 1966), cited by the court at 546 F.2d 384.

Petitioners were bound to continue negotiating until they had reason to believe that the United States could no longer require negotiation of them, either because it was not itself negotiating in good faith or because negotiations would be unavailing.

That negotiations would be unavailing did not become clear until the Department of Interior was replaced by the Department of Defense in 1974. The earliest possible suggestion that negotiations would break down would be the rejection of the Hambleton appraisal by the Navy in 1972.

The Court of Claims departure from established law in starting the statute of limitations before petitioners had themselves fulfilled their performance, and thus before reciprocal performance was due from the United States, calls for the exercise of supervision by this Court. Particularly is this so when the departure occurred in a context in which the United States is a trustee for the benefit of petitioners and the significance of the decision is so great.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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May 5, 1977

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 119-75

(Decided December 15, 1976)

KABUA KABUA, ET AL. v. THE UNITED STATES

Stephen N. Shulman, attorney of record for plaintiff. *Joseph A. Artabane*, and *Cadwalader, Wickersham & Taft*, of counsel.

Herbert Pittle, with whom was Assistant Attorney General *Peter R. Taft*, for defendant.

Before SKELTON, NICHOLS and KASHIWA, *Judges*.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

The plaintiffs have brought this action to recover for an alleged uncompensated taking of Roi-Namur Island. The parties have filed voluminously documented cross motions for summary judgment. Among other defenses, defendant sets up the jurisdictional bar of our six-year statute of limitations, 28 U.S.C. § 2501, which applies to all claims in this court. Since we determine that the suit is barred for that reason, we need not consider the other matters the parties have briefed and argued, and we do not do so.

Plaintiffs say they are the indigenous landowners of Roi-Namur, which is a Micronesian island, part of the Marshalls, a component of the Trust Territories of the Pacific islands, which the United States administers under its Trusteeship Agreement with the United Nations, 61 Stat. 3301. Thus, the chief executive of the government of the

Trust Territory, a High Commissioner, is appointed by the President of the United States with the advice and consent of the Senate. Since 1960, the United States has been using Roi-Namur with the permission of the Trust Territory government, which consented to United States occupancy in consideration of payment of $80,000. Under this Use and Occupancy Agreement, the United States' needs for the lands are to be reviewed by it each five years, and the land is to be returned to the Trust Territory when no longer needed.

The group of plaintiffs, comprised of head chiefs (Iroji), lesser chiefs (alabs), and tenants (dri jerbal), or their ancestors, had inhabited Roi-Namur when Japan assumed control over the territory under a League of Nations mandate. The Japanese government at some time before 1944 built an airbase there, filling in a lagoon and joining Roi and Namur, which had hitherto been two separate islands. They expelled the natives, and the plaintiffs resided elsewhere until after World War II. There is evidence that the Japanese purported to pay compensation, but whether to the right persons and in adequate amounts, we need not determine. In February 1944, United States forces overwhelmed the Japanese garrison in a bloody battle, and thereafter used Roi-Namur as a base until hostilities ended.

In 1949 the Navy suffered a few Marshallese to return to Roi-Namur. That they were the plaintiffs or any of them is not asserted. In 1960 they were removed, leaving behind eight dwellings, a church, and some thirty other structures. Since 1960 no Marshallese person has been allowed to reside upon or use Roi-Namur. The island then became and now is part of the Kwajalein Missile Range. There are structures and improvements, of value approximately $100,000,000, added to the realty in furtherance of this use, since 1960. The Use and Occupancy Agreement does not refer to or recognize any native claims, but rather

seems to visualize that on the termination of the present use, the island will revert to the Trust Territory government as part of its public domain.

On June 29, 1953, the High Commissioner had approved Office of Land Management Regulation No. 1, which announced the procedures before the Land Management Administrator for the adjudication of claims of land ownership throughout the Trust Territory. Section 3 of the Regulation further authorized an appropriate official to release to the owner any tract of private land that was no longer needed by the United States. In November 1962, and again in March 1964, the Trust Territory government published notice that Roi-Namur was considered public land owned by the government, but invited the submission of any private claims. The plaintiffs in this action filed claims under the Regulation in regard to the land on Roi-Namur in 1963 and 1964, objecting that the land granted to the United States was private property and not in the public domain subject to the disposition of the Trust Territory government. The Land Management Administrator determined that the "Iroji" rights in the land were in the plaintiffs. There has been no formal appeal of this determination, but the defendant does not agree with it.

Although their title to the lands occupied by the United States under the Use and Occupancy Agreement had been recognized to that extent, plaintiffs did not seek to eject the United States, but only to obtain the compensation ostensibly due them. Accordingly, by their letter to the High Commissioner dated December 1, 1965, plaintiffs said they agreed to allow the United States to retain undisturbed possession of the land, pending negotiations toward compensation. Since then they have dealt with and managed their claim as a money claim entirely. Negotiations toward plaintiffs' conveying to the United States a long term lease for a consideration did commence, but continued without success through 1974. When plaintiffs were convinced that

continuing with negotiations would be unavailing they filed suit here, April 15, 1975. The parties seem to agree that the United States will pay something, but are wide apart as to what payment would be fair and just. An appraisal was made in 1970 proposing a rental value of Roi-Namur at $7,666.67 per acre as a lump sum for a 50 year period to end February 6, 1994. The Navy has rejected it.

The law is clear that to avoid the bar of § 2501, *supra*, the claimant must bring his suit within six years of the taking date. *Hilkovsky* v. *United States*, 205 Ct. Cl. 460, 504 F. 2d 1112 (1974); *Camacho* v. *United States*, 204 Ct. Cl. 248, 495 F. 2d 1363 (1974). We pass over any happening before 1960, but since that date the United States has been in open and notorious possession under claim of right, and has made large improvements, under an agreement with the Trust Territory which purported to act as the owner. The Navy's possession is indeterminate in duration, subject only to a return of the island to the Trust Territory at some time when, by the Navy's own unilateral determination, its use is at an end. If the suit is one to try title, as plaintiffs seem to express it at times, it is cognizable in this court on a taking theory. *Bourgeois* v. *United States*, Ct. Cl. (decided November 15, 1976). The facts are consistent with no other view than that whatever ownership the plaintiffs have was taken long since.

The plaintiffs seek to avoid the bar by saying they were entitled to wait until the duration of the taking was announced, since it was avowedly temporary. They cite *United States* v. *Dickinson*, 331 U.S. 745, 749 (1947); and *Castro* v. *United States*, 205 Ct. Cl. 534, 500 F. 2d 436 (1974).

The former case is by *United States* v. *Dow*, 357 U.S. 17 (1958), more or less limited to the class of flooding cases to which it belonged, when the landowner must wait in asserting his claim, until he knows whether the subjection to flooding is so substantial and frequent as to constitute a taking. *Dow* holds the usual rule to be that the taking oc-

curs when the United States first enters into possession, and not when it acquires title. P. 22. In *Castro*, the opinion outlines a temporary taking for varying and different temporary reasons, the first, the presence of an ammunition dump in the area, next the stationing of the NTTU, and finally because of the hazards of live explosives buried in the soil. But the land was never included in the military's list of lands designated for military retention areas. It is easy to see superficial similarities since the *Castro* lands were on Saipan, in the Pacific war zone and the subsequent Trust Territory. But here we have a use commenced in 1960 and never subsequently varied, with a long retention obviously visualized in view of the large construction of facilities. The mere possibility of a reverter after the missile range use might be unilaterally declared to be at an end, can in no way serve to toll the statute in the same manner as the varied and multiple uncertainties as to the taker's intentions, spelled out in the *Castro* decision. Here, in a timely suit, plaintiffs could have successfully urged that as of a 1960 taking date, the possibility of a reverter was too remote and uncertain to impede the prompt ascertainment of an award, which necessarily would, with respect to *quantum*, have been not materially less than the entire value of the land taken as a fee simple.

As held in *Camacho*, the land title proceedings before the Land Management Administration did not toll the statute. Nor can mere settlement negotiations, as conducted subsequently, ever do so. The United States was not a party before the Land Management Commissioner, and his determination for plaintiffs could not and can not be taken as determining that the United States was not in possession as a taker at the time. At most it qualifies them as claimants, or purports to do so. Accordingly, we think the statute of limitations had run on the taking claim before the petition was filed herein.

Plaintiffs also rely on what they call an implied-in-fact contract. They interpret their letter of December 1, 1965, as permitting the continued occupancy by the United States, conditioned on payment of compensation. Though addressed to the Trust Territory Commissioner, somehow it embodied a contract with the United States. Presumably it was in their view an offer, accepted by continued occupancy and by conduct of negotiations to determine the quantum of compensation. Whether inadvertently or not, defendant lent some support to this view by admitting in its answer a petition allegation that it held possession "under the terms of the December 1, 1965, Iroji letter." It seems clear from all the facts submitted on the cross motions that defendant is holding under its 1960 Use and Occupancy Agreement with the Government of the Trust Territory. If, however, plaintiffs conveyed any interest in 1965, this was still over nine years before suit was brought and the negotiations for the pecuniary *quid pro quo* have or should have gone on almost as long. By the 1965 letter, they were to commence "at an early date." A claim on an implied contract with the United States is held to accrue "when it can be definitely ascertained and set up, when all that is required of him by the terms of the contract has been fulfilled by the contractor." *Steel Improvement Co.* v. *United States*, 174 Ct. Cl. 24, 28, 355 F. 2d 627, 630 (1966). We hold, therefore, that any possible claim founded on an implied-in-fact contract accrued more than six years before suit was brought.

The plaintiffs say that on February 14, 1974, the United States Office of Management and Budget ousted the Trust Territory Government and its "overseer," the Department of the Interior, from conduct of the settlement negotiations, and substituted the Department of Defense. We see no way by which this act could be held to toll the statute or accrue a new claim. Of course any suit whenever brought would all along have had to be predicated on the proposi-

tion that the United States, not the Trust Territory Government, was the taker in possession or the party who made the contract implied-in-fact. If the obligation to be enforced was that of the latter, the Trust Territory, jurisdiction here would be lacking on another ground. *Porter* v. *United States*, 204 Ct. Cl. 355, 496 F. 2d 583 (1974), *cert. denied*; 420 U.S. 1004 (1975).

Plaintiffs also assert support of their claim by the United Nations Trusteeship Agreement; however, the general obligation thereby created, to protect the natives against the loss of their land and resources, does not add anything to our jurisdiction as Congress has spelled it out. This does not include claims founded on treaties, 28 U.S.C. § 1502, but if it did, the six year period of limitations would apply still, and bar the claim.

Our inability to resolve the long impasse on quantum is no doubt regrettable, since it is doubtful whether plaintiffs can recover anywhere else against the taker in possession. However, our jurisdiction is always strictly construed because it depends on the consent of the sovereign to be sued, and is not to be extended by implication. *United States* v. *King*, 395 U.S. 1 (1969); *United States* v. *Testan*, 424 U.S. 392 (1976). Here, as in the cases cited, our desire to be of service is countervailed by the limitations on our jurisdiction. It would appear, however, that the willingness of defendant to pay something here is possibly based as much on moral as on legal grounds. The former category does not weigh in this court, unless it is made a legal ground by statute. Defendant's able counsel must resist every claim with every available defense, that private counsel might properly use to defend a private client. Therefore, plaintiffs are often astounded to encounter objections to the very existence of their claims, that were not heard of or not urged in the prior negotiations. Our recognition that the Statute of Limitations defense is valid enables us to ignore others that could well be equally decisive here. The

reader must not suppose that defendant has allowed them to appear waived or neglected. In general, we think a tribunal like this is not likely to be able to come up with a morally satisfactory resolution of a native or tribal claim, unless it has the support of special jurisdictional legislation comparable in its thrust to the Indian Claims Commission Act of 1946, 25 U.S.C. § 70 and ff., which allows enforcement of specified kinds of moral claims, not that we urge it as a model to follow in all details. Better yet perhaps it may be to relieve poverty where it is found, without going through elaborate and costly ritual designed to show that compensation is being assessed for an ancient wrong. Plaintiffs' able counsel has done as much as anyone could for his clients, but the Tucker Act, 28 U.S.C. § 1491, just simply is not an implement suited to his need.

Accordingly, upon review of the motions and supporting documents, and upon briefing and oral argument, it is ordered that plaintiffs' motion for summary judgment is denied, defendant's motion for summary judgment is allowed, and the petition is dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 119-75

KABUA KABUA, ET AL.

v.

THE UNITED STATES

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

Order

This case comes before the court on plaintiffs' motion, filed January 17, 1977, for rehearing *en banc* pursuant to Rules 7(d) and 151(b), requesting reconsideration of the opinion of December 15, 1976, which dismissed plaintiffs' petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiffs' said motion for rehearing be and the same is denied.

BY THE COURT

/s/ BYRON SKELTON
Byron Skelton
Judge, Presiding

February 4, 1977.

APPENDIX C

TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED ISLANDS

Preamble

WHEREAS Article 75 of the Charter of the United Nations provides for the establishment of an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent agreement; and

WHEREAS under Article 77 of the said Charter the trusteeship system may be applied to territories now held under mandate; and

WHEREAS on 17 December 1920 the Council of the League of Nations confirmed a mandate for the former German Islands north of the equator to Japan, to be administered in accordance with Article 22 of the Covenant of the League of Nations; and

WHEREAS Japan, as a result of the Second World War, has ceased to exercise any authority in these islands;

NOW THEREFORE, the Security Council of the United Nations, having satisfied itself that the relevant articles of the Charter have been complied with, hereby resolves to approve the following terms of trusteeship for the Pacific Islands formerly under mandate to Japan.

Article 1

The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the Pacific Islands is hereinafter referred to as the trust territory.

Article 2

The United States of America is designated as the administering authority of the trust territory.

Article 3

The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable such of the laws of the United States as it may deem appropriate to local conditions and requirements.

Article 4

The administering authority, in discharging the obligations of trusteeship in the trust territory, shall act in accordance with the Charter of the United Nations, and the provisions of this agreement, and shall, as specified in Article 83(2) of the Charter, apply the objectives of the international trusteeship system, as set forth in Article 76 of the Charter, to the people of the trust territory.

Article 5

In discharging its obligations under Article 76(a) and Article 84, of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

1. to establish naval, military and air bases and to erect fortifications in the trust territory;

2. to station and employ armed forces in the territory; and

3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory.

Article 6

In discharging its obligations under Article 76(b) of the Charter, the administering authority shall:

1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall develop their participation in government; and give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends;

2. promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication;

3. promote the social advancement of the inhabitants and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination; protect the health of the inhabitants; control the traffic in arms and ammunition, opium and other dangerous drugs, and alcoholic and other spiritous beverages; and

institute such other regulations as may be necessary to protect the inhabitants against social abuses; and

4. promote the educational advancement of the inhabitants, and to this end shall take steps toward the establishment of a general system of elementary education; facilitate the vocational and cultural advancement of the population; and shall encourage qualified students to pursue higher education, including training on the professional level.

Article 7

In discharging its obligations under Article 76(c), of the Charter, the administering authority shall guarantee to the inhabitants of the trust territory freedom of conscience, and, subject only to the requirements of public order and security, freedom of speech, of the press, and of assembly; freedom of worship, and of religious teaching; and freedom of migration and movement.

Article 8

1. In discharging its obligations under Article 76(d) of the Charter, as defined by Article 83(2) of the Charter, the administering authority, subject to the requirements of security, and the obligation to promote the advancement of the inhabitants, shall accord to nationals of each Member of the United Nations and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favourable than that accorded therein to nationals, companies and associations of any other United Nation except the administering authority.

2. The administering authority shall ensure equal treatment to the Members of the United Nations and their nationals in the administration of justice.

3. Nothing in this Article shall be so construed as to accord traffic rights to aircraft flying into and out of the trust territory. Such rights shall be subject to agreement between the administering authority and the state whose nationality such aircraft possesses.

4. The administering authority may negotiate and conclude commercial and other treaties and agreements with Members of the United Nations and other states, designed to attain for the inhabitants of the trust territory treatment by the Members of the United Nations and other states no less favourable than that granted by them to the nationals of other states. The Security Council may recommend, or invite other organs of the United Nations to consider and recommend what rights the inhabitants of the trust territory should acquire in consideration of the rights obtained by Members of the United Nations in the trust territory.

Article 9

The administering authority shall be entitled to constitute the trust territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction and to establish common services between such territories and the trust territory where such measures are not inconsistent with the basic objectives of the International Trusteeship System and with the terms of this agreement.

Article 10

The administering authority, acting under the provisions of Article 3 of this agreement, may accept membership in any regional advisory commission, regional authority, or technical organization, or other voluntary association of states, may cooperate with specialized international bodies, public or private, and may engage in other forms of international cooperation.

Article 11

1. The administering authority shall take the necessary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory.

2. The administering authority shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority.

Article 12

The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory.

Article 13

The provisions of Articles 87 and 88 of the Charter shall be applicable to the trust territory, provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.

Article 14

The administering authority undertakes to apply in the trust territory the provisions of any international conventions and recommendations which may be appropriate to the particular circumstances of the trust territory and which would be conducive to the achievement of the basic objectives of Article 6 of this agreement.

Article 15

The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority.

Article 16

The present agreement shall come into force when approved by the Security Council of the United Nations and by the Government of the United States after due constitutional process.